Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1074

ALFRED KARGE, JOHN THOMAS,
AND DAVID ANDERSON,

Petitioners,

vs.

HERBERT MILNES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

HARRY J. SMITH JR.,
LAWRENCE J. CZEPIEL,
LAW OFFICE OF HARRY J. SMITH, JR.,
2725 North Thatcher,
River Grove, Illinois 60171,
(312) 456-4500.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

ALFRED KARGE, JOHN THOMAS
AND DAVID ANDERSON,

Petitioners,

vs.

HERBERT MILNES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Alfred Karge, John Thomas and David Anderson, Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this matter on the 12th day of October, 1978.

OPINIONS BELOW.

The October 12th opinion of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is unreported (Case No. 78-2096) and is reprinted in the Appendix to this Petition, Appendix C. The Seventh Circuit's opinion arose on Plaintiff-Appellee's Motion to Dismiss the Appeal.

JURISDICTION.

The Judgment of the Seventh Circuit Court of Appeals which dismissed your Petitioner's Appeal was entered on the 12th day of October, 1978. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the lower District (Northern District of Illinois, Eastern Division) Court's order of July 20, 1978 was that Court's "final" order, terminating all litigation between the adversary parties and providing the Seventh Circuit Court of Appeals with jurisdiction to entertain the appeal of the entire case under 28 U. S. C. § 1291?

STATUTORY PROVISION INVOLVED.

This case involves an interpretation of 28 U. S. C. § 1291 which provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE.

Mr. Herbert Milnes filed a civil rights action against Alfred Karge, John Thomas, and David Anderson under 42 U. S. C. § 1983 on the ground that these Defendants deprived him of his constitutional rights guaranteed under the Fourteenth Amendment. The United States District Court, Judge Joseph Sam Perry presiding, concurred and found against these three defendants (Appendix, Exhibit A). The United States District Court's

Decree and Judgment Order in this matter was filed on April 19, 1978.

Besides finding against the Defendants, the Court's decree also reflected the following:

> ". . . 17. The plaintiff has filed an application for attorney's fees herein . . . (Findings of Fact, para. 17, p. 4 of Judgement Order)
>
> ". . .5. The plaintiff is entitled to have his attorneys fees allowed herein, and assessed against defendants Karge, Thomas, and Anderson *after a hearing and determination* of the fair and customary amount of such fees for necessary services rendered for him by his attorney . . . (Conclusion of Law, para. 5, p. 5 of Judgment Order)
>
> . . . It is further ordered that plaintiff is entitled to have his attorney's fees assessed against defendants Alfred Karge, John Thomas and David Anderson and that defendants be and they hereby are given 10 days to *answer* plaintiff's application for attorney's fees. The Court thereafter will set a date for a hearing on Attorney's fees and the Court reserves jurisdiction for that purpose . . ." (Decree and Judgment Order, p. 6 of same.)

On June 9, 1978, the Defendants filed a motion for leave to file a notice of appeal under Rule 4(a), Federal Rules of Appellate Procedure. The U. S. District Court granted this motion over objection of the Plaintiff's Attorney. On August 7, 1978, however, the Seventh Circuit Court of Appeals dismissed the appeal on the motion of the Plaintiff-Appellee, Herbert Milnes on the ground that it was not timely filed.

The U. S. District Court's Ruling of April 19, 1978, however, left open the matter of Attorney's Fees. This final matter was resolved on July 20, 1978 when the attorneys for all the parties entered into an agreed order, which was approved by the Court. This agreed order provided that the Plaintiff, Herbert Milnes, would be awarded the sum of $9,965.00 as and for his attorneys fees (Appendix, Exhibit B).

On August 16, 1978, the Defendants-Appellants filed their second appeal with the Clerk of the U. S. District Court. Under this Notice of Appeal, the Defendants-Appellants attempted to appeal the U. S. District Court's Rulings of April 19th and of July 20th, 1978. Again, the Plaintiff-Appellee filed a Motion to Dismiss the appeal. On October 12, 1978 the Seventh Circuit Court of Appeals dismissed the appeal stating in part . . .

> the order of April 19, 1978, which determined the issues in the case and ordered that plaintiff-appellee was entitled to attorney fees, but reserved the determination of amount of attorney fees, was a final order, and appealable as such. *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (7th Cir. 1975); *Hodell* v. *International Diversified Investments*, 520 F. 2d 529 (7th Cir. 1975). Therefore, the notice of appeal was untimely for the purpose of review of the April 19, 1978 order, and this court lacks jurisdiction. (Appendix, Exhibit C.)

REASON FOR GRANTING WRIT.

The issue presented by this case involves a matter of interpretation of Title 28, § 1291 United States Code as presented by the apparent and conflicting interpretation given the word "final" as between the Seventh Circuit Court of Appeals in *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (7th Circuit, 1975) and the Third Circuit Court of Appeals in *Richerson* v. *Jones*, 551 F. 2d 918 (3rd Circuit 1977).

It is further apparent from case history in this area that this is a question of first impression in this Court; especially in view of the fact that only the Seventh and Third Circuit Courts of Appeal have had an opportunity to formulate principles—although they are conflicting in this area of law.

In 1975, the Seventh Circuit Court of Appeals decided *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555. The Swanson case was a Stockholder's derivative action which alleged violations of the Securities and Exchange Act in

connection with a proposed reorganization plan requiring the transfer of a substantial amount of corporate assets. The District Court entered one order which disposed of all claims between the *adversary* parties and then entered a subsequent order which required the successor of the corporation *on whose behalf* the action was maintained to reimburse the individual stockholder who had initiated the action for his reasonable attorneys' fees. The Seventh Circuit Court of Appeals ruled that this subsequent order was "incidental" to the main body of litigation and had *no* relation to the adversary process culminating in the first order. The context of the subsequent order was merely a settlement of fees between "co-plaintiffs." Consequently, the first order which disposed of all claims between the adversary parties was "final" for appeal purposes.

In 1977, the Third Circuit Court of Appeals decided *Richerson* v. *Jones*, 551 F. 2d 918. *Richerson* was an employment discrimination action brought by the Plaintiff-Federal Employee against his supervisor at the Philadelphia Naval Shipyard under §717 of the Equal Employment Opportunity Act of 1972; 42 U. S. C. § 2000e-16. The lower court in *Richerson* had issued two orders; one on March 12th which decided the merits of the case but did not dispose of the issue of attorney's fees and one order on April 29th which did dispose of this remaining issue of attorney's fees.

The Third Circuit considered the question of the April 29th order in view of the jurisdictional requirements of 28 U. S. C. § 1291.

In an opinion citing the United States Supreme Court case of *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U. S. 737, 93 S. Ct. 1202, 47 L. Ed. 2d 435 (1976), the Third Circuit ruled that an order not disposing of Plaintiff's prayer for substantial attorney's fees was not a final order. The court also noted that judgments which leave the *assessment* of damages or awarding of other relief unresolved "have never been considered to be

final even within the meaning of 28 U. S. § 1291." *Richerson*, 551 F. 2d 918, 922.

The Third Circuit then carefully distinguished the Seventh Circuit Case of *Swanson* v. *Amercan Consumer Industries Inc.*, 517 F. 2d 555 (7th Cir. 1975):

> *Swanson* was a stockholder's derivative action in which the district court entered one order which disposed of all claims between the Plaintiff and the defendant and a subsequent order which required the successor of the corporation on whose behalf the action was maintained to reimburse the individual stockholder who had initiated the action for the reasonable attorney's fees he had incurred. *Swanson* held that the first of these orders was the final order and that the second was "incidental to the main litigation." Id. at 561. That Court appears to have reasoned that the first order terminated the litigation between the parties, leaving unresolved only the award of attorney's fees between the Plaintiff stockholder and the corporation on whose behalf he sued. In this case, by contract, the plaintiff requested that his reasonable attorney's fees be assessed against the defendant with whom he was litigating in an adversary context, not a "co-plaintiff" whose position he was supporting. Consequently, the order of March 12, which left the issue of attorney's fees unreasolved, did not terminate the litigation between Richerson and the government and, thus, was not a final order. *Richerson*, 551 F. 2d 918, 922.

An analysis of the present case shows its striking similarity to the *Richerson* case and its patent dissimilarity with *Swanson*. In the present case, the U. S. District Court's order of April 19, 1978 expressly left open the issue of Attorney's fees. At the same time, however, the District Court retained jurisdiction over the case and also retained jurisdiction to hold further hearings on the issue of Plaintiff's application for Attorney's fees (Decree and Judgment Order of April 19, 1978, at p. 6—see Appendix Exhibit A). In the order of April 19, 1978, the District Court made the awarding of attorney's fees part of the main litigation. And, if necessary, extensive hearings on this issue of attorney's

fees would have been held *by order of the court;* these hearings would have continued the adversary roles of the opposing parties. Thus, if the adversary roles between the parties were to continue as perceived by the Court's order, the litigation would not be final until this remaining issue was settled.

The present case involved litigation between adversary parties both on the main merits of the case and on the issue of Attorney's fees. In stark contrast to *Swanson*, the Plaintiff (Appellee) herein, Mr. Herbert Milnes, requested that the Court award and fix attorney's fees *against* his *adversaries*—the Defendant Appellants on this Writ. The *Adversary* context of the case remained *after* the order of April 19, 1978; the *adversary* context *continued* until the matter was concluded by an agreed order issued on July 20, 1978. This order disposed of Plaintiff-Appellee's final request for relief, just as the *Richerson's* Court's final order of April 29th disposed of his final prayer for relief.

The issue presented by this case seeks resolution of a conflict among the Seventh and Third Circuit Courts of Appeals. That conflict seeks to determine what is a final appealable order under 42 U. S. C. § 1291, where the facts presented show that a District Court's first order does not dispose of the issue of attorney's fees, but expressly makes them part of the main litigation and where the District Court's second order disposes of this final matter between the adversary parties.

CONCLUSION.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

HARRY J. SMITH JR.,
LAWRENCE J. CZEPIEL,
LAW OFFICE OF HARRY J. SMITH, JR.,
2725 North Thatcher,
River Grove, Illinois 60171,
(312) 456-4500.

APPENDIX EXHIBIT A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

HERBERT L. MILNES,
Plaintiff,
vs.

JOHN J. DALBIS, JOSEPH J. SAMBUCCI, RAYMOND SCHALKOWSKI, ARTHUR MELMER, GEORGE J. SIERACKI, JOHN SHEMROSKE, individually and as members of the Board of Trustees of the Village of Schiller Park, Illinois, and EDWARD E. BLUTHARDT, individually and as President and member of the Board of Trustees of the Village of Schiller Park, Illinois, ALFRED KARGE, JOHN THOMAS, DAVID ANDERSON and the Village of Schiller Park, a Municipal Corporation,
Defendants.

No. 76 C 1563

DECREE AND JUDGMENT ORDER INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on to be heard upon the verified second amended complaint for injunctive and other relief, the parties hereto appearing through their counsel; the court also having heard the testimony of witnesses in open court and arguments of counsel and having read, considered and approved the findings

and recommendations of Magistrate James T. Balog; and the court now being fully and duly advised in the premises makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The findings and recommendations of Magistrate Balog in his report are supported by the evidence in the case and are hereby adopted as part of the court's findings of fact and conclusions of law as if set forth hereinafter *haec verba*.

2. In addition to the evidence taken by the Magistrate, the court took evidence herein and makes these additional findings of fact and conclusions of law.

3. The plaintiff is a regular full-time fireman of the defendant Village of Schiller Park and the defendants Karge, Thomas and Anderson are the duly-appointed and qualified members of the Board of Police and Fire Commissioners of the defendant Village. The defendants Dalbis, Sambucci, Schalkowski, Melmer, Sieracki and Shemroske are members of the Board of Trustees of the Village of Schiller Park. The defendant Bluthardt is the President of said Board.

4. On December 22, 1975 plaintiff was performing his duties as the Shift Officer of the Gold Watch of the Fire Department of the Village of Schiller Park with the third highest seniority in the department.

5. On that date plaintiff received a notice from the Chief of the Fire Department that he was being removed as the Shift Officer of the Gold Watch and was ordered to report as the fifth man on the Black number one shift, effective January 2, 1976.

6. The removal of the plaintiff from his position as Shift Officer of the Gold Watch to the Black Watch was a demotion and disciplinary step taken against plaintiff without cause.

7. Plaintiff made immediate demands for written charges and a hearing in accordance with the procedures set out in the

ordinances of the Village of Schiller Park. All such requests were refused.

8. The Schiller Park Police and Fire Commission caused to be given on February 14, 1976 an examination for the rank of lieutenant for which all certified firemen were eligible. The passing grade for this examination was 70 and those persons who took the examination who scored below that grade were ineligible to take the oral.

9. The purpose of the examinations was to compile a promotional list of persons for the rank of Fire Lieutenant in the Schiller Park Fire Department from which the shift officers of the three shifts would be taken in order of their standing on the list.

10. In addition to the written and oral scores, seniority and military points were also to be given in order to determine final standing on the Promotional List.

11. There is no evidence that the written examination conducted by the Bureau of Testing Services of Hillside, Illinois was not fully and fairly conducted for the purpose of determining eligibility to perform the duties of Fire Lieutenant in the Schiller Park Fire Department.

12. The oral examinations conducted in the Spring of 1976 were given to persons ineligible to take them and, in addition, the oral examinations were given arbitrarily in order to fix a final grade for the Fire Lieutenant Promotional List to offset a high or low written grade score for the unlawful purpose, among others, of ensuring that plaintiff would not be named a Lieutenant to head one of the three shifts.

13. On May 25, 1976 the Police and Fire Commission of the Village of Schiller Park posted a Promotional List based upon the written and oral scores under the oral examinations conducted in the Spring of 1976. The Promotional List accorded no points for military service or seniority.

14. The oral examination was a sham and was employed for the purpose of subverting plaintiff's rights.

15. The oral examination is not necessary in order to ascertain the qualifications of firemen to discharge his or her duties as a shift officer.

16. The final scores as shown on the aforesaid Promotional List and the respective positions of the plaintiff and other six persons appearing thereon were the result of arbitrary and unlawful acts of the defendants Karge, Thomas and Anderson. The list is a nullity.

17. The plaintiff has filed an application for attorney's fees herein.

Conclusions of Law

1. The court has jurisdiction of the subject matter hereof and of the parties hereto.

2. The defendants Karge, Thomas and Anderson were the sole Commissioners on the Board of Police and Fire Commissioners of the Village of Schiller Park and as such Commissioners used their respective offices as a cloak and acting under color of law did all of the acts against plaintiff hereinabove set forth in an arbitrary and capricious manner and outside their official duties.

3. The acts of the defendants Karge, Thomas and Anderson described herein violated plaintiff's rights under Section 1983, United States Code, and the Due Process clause of the Fourteenth Amendment to the United States Constitution.

4. The plaintiff is entitled to have judgment against defendants Karge, Thomas and Anderson.

5. The plaintiff is entitled to have his attorney's fees allowed herein, and assessed against defendants Karge, Thomas and Anderson, after a hearing and determination of the fair and customary amount of such fees for necessary services rendered for him by his attorney.

Decree and Judgment Order

1. It is, therefore Ordered pursuant to Rule 65(d), Federal Rules of Civil Procedure, that the defendants Alfred Karge, John Thomas and David Anderson, their agents, servants, employees and attorneys and all persons in active concert or participation with them, shall be, and are hereby, permanently enjoined from using the Promotional List for Fire Lieutenant dated May 25, 1976 for any purpose.

2. It is Further Ordered that the defendants Alfred Karge, John Thomas and David Anderson shall post a new Promotional List for the appointment of Fire Lieutenants and the respective positions of the plaintiff and others thereon (who scored 70 or higher) shall be based solely upon the scores of the written test conducted on February 14, 1976 plus the military and seniority points required by the laws of Illinois and the ordinances of the Village of Schiller Park.

It is Further Ordered, Adjudged and Decreed that the findings of fact and conclusions of law of Magistrate James T. Balog dated December 30, 1977, made pursuant to the order of reference of November 6, 1977, shall be, and are hereby, ratified, confirmed and adopted as the findings and conclusions of the court and judgment shall be, and is hereby, entered thereon.

It is Further Ordered that plaintiff is entitled to have his attorney's fees assessed against defendants Alfred Karge, John Thomas and David Anderson and that defendants be and they hereby are given 10 days to answer plaintiff's application for attorney's fees. The court thereafter will set a date for a hearing on attorney's fees and the court reserves jurisdiction for that purpose.

It is Further Ordered that the court shall and the court hereby does retain jurisdiction to enforce the provisions of this Decree and Judgment Order.

ENTER:

/s/ J. S. Perry

Dated: April 19, 1978 *Judge*

APPENDIX EXHIBIT B.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

HERBERT L. MILNES,
Plaintiff,

vs.

JOHN J. DALBIS, JOSEPH J. SAMBUCCI, RAYMOND SCHALKOWSKI, ARTHUR MELMER, GEORGE J. SIERACKI, JOHN SHEMROSKE, individually and as members of the Board of Trustees of the Village of Schiller Park, Illinois, and EDWARD E. BULTHARDT, individually and as President and member of the Board of Trustees of the Village of Schiller Park, Illinois, ALFRED KARGE, JOHN THOMAS, DAVID ANDERSON and the Village of Schiller Park, a Municipal Corporation,
Defendants.

No. 76 C 1563

AGREED ORDER

THIS CAUSE COMING ON TO BE HEARD upon the application of the plaintiff for an award of attorneys' fees against the defendants Anderson, Karge and Thomas, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the plaintiff shall be, and is hereby, awarded attorneys' fees pursuant to the judgment order of April 19, 1978 against the defendants Alfred Karge, John

Thomas and David Anderson in their official capacities as members of the Village of Schiller Park Police and Fire Commission in the amount of $9,965.00 through the date of the entry of this order.

ENTER:

.....

United States District Court Judge

Agreed as to form and amount without prejudice to the issue of whether any attorneys' fees should be awarded in plaintiff's favor:

/s/ HARRY J. SMITH, JR.
Harry J. Smith, Jr.
Attorney for Defendants Karge, Anderson and Thomas

Agreed and Approved:

/s/ JOHN M. BOWLUS
John M. Bowlus
Attorney for Plaintiff

APPENDIX EXHIBIT C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted date: October 10, 1978
October 12, 1978

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

HERBERT L. MILNES,
Plaintiff-Appellee,
No. 78-2096 *vs.*
ALFRED KARGE, JOHN THOMAS and DAVID ANDERSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-1563
Judge Perry

This matter comes before the court for its consideration upon the filing of the following documents:

1) The "Plaintiff-Appellee's Motion to Dismiss Appeal" filed herein on September 15, 1978.

2) The "Brief in Support of Plaintiff-Appellee's Motion to Dismiss Appeal" also filed herein on September 15, 1978.

3) The "Response to Plaintiff-Appellee's Motion to Dismiss Appeal" filed herein on September 29, 1978 by counsel for the defendants-appellants.

The order of April 19, 1978, which determined the issues in the case and ordered that plaintiff-appellee was entitled to attorney fees, but reserved the determination of amount of attorney fees, was a final order, and appealable as such. *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (7th Cir. 1975); *Hodell* v. *International Diversified Investments*, 520 F. 2d 529 (7th Cir. 1975). Therefore, the notice of appeal was untimely for the purpose of review of the April 19, 1978 order, and this court lacks jurisdiction. Accordingly,

IT IS ORDERED that this appeal from a decision of the United States District Court for the Northern District of Illinois, Eastern Division, is hereby DISMISSED.